12-1900-10284-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Alleged Labor Law Violation of Chafoulias Management Co., d/b/a Radisson Plaza Hotel, Rochester	**RECOMMENDATION OF SUMMARY DISPOSITION TO COMPLAINANT**

The above-entitled matter is before Administrative Law Judge Steve M. Mihalchick on Complainant's Motion for Summary Disposition. On August 13, 1996, the Administrative Law Judge issued an Order Denying Respondent's Motion to Dismiss and Granting Partial Summary Disposition to Complainant. The parties subsequently submitted additional affidavits and argument on the remaining unresolved issues.

John P. Haberman, Attorney at Law, Law Offices of Martin L. Garden, 2520 Centre Village, 431 South Seventh Street, Minneapolis, Minnesota 55415, appeared on behalf of Respondent Chafoulias Management Co., d/b/a Radisson Plaza Hotel, Rochester. Susan C. Gretz, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, Minnesota 55103-2106, appeared on behalf of the Complainant, Minnesota Department of Labor and Industry (Complainant or Department). The record was closed on the remaining issues on November 22, 1996, upon receipt of the final briefs.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Labor and Industry will make the final decision after a review of the record. The Commissioner may adopt, reject or modify this Report. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Gary W. Bastian, Commissioner, Department of Labor and Industry, 443 Lafayette Road, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

Based upon the record herein and for the reasons set forth in the following Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of Labor and Industry:

1. Adopt the Administrative Law Judge's Order Denying Respondent's Motion to Dismiss and Granting Partial Summary Judgment to Complainant of August 13, 1996 (the Previous Order)[1].

2. Grant Summary Disposition to Complainant as to all remaining issues.

3. Affirm the Labor Law Violation and Order to Comply issued to Respondent on October 2, 1995, modified as follows:

   a. Minn. Stat. § 177.24, subd. 1, minimum wage, failed to pay at least $4.25 per hour to all employees.

   b. Minn. Stat. §§ 177.23, subd. 9, and 177.24, subds. 2 and 3, and Minn. R. 5200.0080, gratuities, failed to distribute all of obligatory gratuity charged to employees, employer retained 40 percent of the gratuities.

   c. Minn. Stat. § 177.30, records, failed to record weekly totals on time records. Some time records are missing and many of them are unreadable.

4. Dismiss the provision of the Labor Law Violation and Order to Comply regarding Minn. Stat. § 177.25, Overtime, which was withdrawn by the Department.

5. Affirm the penalty of $200.00 issued for the violation of Minn. Stat. § 177.30.

6. Declare any purported settlement agreement by which any of Respondent's employees agreed to accept less than the minimum wage as determined in this proceeding or to accept less than the amount of gratuities as determined in this proceeding as contrary to Minn. Stat. § 177.33 (1994) and void.

7. Order that Respondent pay to Complainant the amount of $6,397.88 as back wages for wages that were less than the minimum wage paid to the employees identified on Gretz Affidavit, Ex. A, . Such amount shall be placed in an escrow account for distribution to the employees pursuant to Minn. Stat. § 177.27, subd. 6. Complainant shall credit Respondent with any payments made to the employees under the purported settlement agreements if, under the purported settlement agreements, such payments have been expressly identified as wages and not as gratuities, commissions, or other payments.

8. Order that Respondent pay Complainant the amount of $108,735.64 as gratuities retained by Respondent which were the property of the employees identified in Gretz Affidavit, Exs. B and C. The amount shall be held in escrow for the employees pursuant to Minn. Stat. § 177.24, subd. 6, and distributed to them in the amounts shown in Gretz Affidavit, Exs. B and C, multiplied by an adjustment factor of 2.67. Respondent shall be allowed a credit against such payment in the amount of payments made to the employees under the purported settlement agreements for amounts not expressly identified in the settlement agreements as wages.

9. Order that Respondent pay Complainant hearing costs of up to $11,513.35, being 10 percent of the back wages and gratuities awarded, in that the Administrative Law Judge finds that Respondent had no meritorious defense against the claims presented, all pursuant to Minn. Stat. § 177.27, subd. 6 (1994).

8. Order that interest accrue on the unpaid balance of the Commissioner's Order from the date of the Order until it is paid, at the annual rate provided in Minn. Stat. § 549.09, subd. 1(c), pursuant to Minn. Stat. § 177.27, subd. 7 (1996).

Dated this 23rd Day of December, 1996.

STEVE M. MIHALCHICK
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Facts

For the purposes of this motion, the following facts appear. They are based upon the affidavits, documents and depositions submitted, and taken in the light most favorable to Respondent. There is no genuine issue as to the following facts. Some of the facts were recited in the Previous Order, but are repeated here for the sake of clarity.

Respondent Chafoulias Management Co. is a corporation that owns the Radisson Plaza Hotel in Rochester, Minnesota, and operates it under a franchise from Radisson Hotels. It has about 175 employees, and 20 to 30 of those work as banquet staff. That figure fluctuates and most of those employees also work in the hotel's various restaurants. Deposition of Carry Mueller at 5-6.

The audit period in this matter is April 2, 1993, to April 7, 1995. The audit involves Respondent's practice during that time of charging its banquet customers a 16 percent service charge and then paying over only a portion of the service charge to the employees who worked the banquet. At no time did Respondent provide its banquet customers a clear and conspicuous notice that the service charges were not gratuities or not the property of the employees.

There were four types of employees that worked banquets. There were banquet set-up employees who set up the tables, arranged them, and set them with tablecloths, plates and silverware. There were banquet servers, who brought the plates to the seated guests (or assisted with the food in the case of buffet-style meals), served beverages and cleared the tables. There were banquet managers, assistant banquet managers, banquet supervisors, and banquet captains, who supervised the operation as well as assisting the banquet servers in serving food and beverages and clearing tables. If the customer requested a bar, one or more bartenders would also work the banquet and prepare and serve drinks to the customers directly or to the banquet servers. Among the banquet employees, many worked in different positions at different banquets. Certain employees might work as banquet set-up one day, as a banquet server another day, and as a banquet manager another day. Cooks and dishwashers were involved in performing work related to the banquets, but they were considered separately as kitchen staff.

The pay was different depending upon the banquet position being worked. During the audit period, employees were paid approximately $6.00 per hour when working banquet set-up. Until February 1995, employees working as banquet servers were paid a wage of less than the minimum wage of $4.25 per hour; they were generally paid between $3.40 and $3.95 per hour. In addition, they were paid a portion of the service charge for each banquet they worked. This was paid by Respondent as a "commission" and added to their wages for the day. The pay was labeled as "GRAT" on Respondent's payroll register and was included in the employees' gross pay for purposes of calculating taxes and other deductions. Persons working as banquet

managers were paid approximately $5.95 per hour plus a share of the services charge for each banquet they worked. Bartenders were paid approximately $5.85 per hour plus a share of the service charge for each banquets they worked. Affidavit of Sandi Maier dated August 30, 1996; Mueller Deposition at 38-39; Wade Affidavit, Ex. A (Payroll Registers).

The employees who worked the banquets were told that, other than when working banquet set-up, they were being paid a base wage plus a portion of the banquet service charge, which was referred to as a commission or gratuity. They were told that the commission counted toward the minimum wage. Respondent told, or led the employees to believe, that it was retaining four percentage points of the 16 percent service charge and distributing the remaining 12 percentage points among the employees who worked each banquet. In fact, Respondent was also retaining 20 percent of the employees' 12 percentage points as well. Thus, Respondent was keeping 6.4 points and paying the employees 9.6 points of the 16 percent service charge. Stated differently, Respondent was keeping 40 percent of the service charge and paying only 60 percent of it over to the employees.

By letter of January 15, 1995, Respondent's general manager notified at least some of the banquet employees that the compensation package was being restructured and it had been determined that the employees should have a guaranteed wage of $4.25 per hour. The letter also stated that the hourly wage was being moved up to $4.25 per hour, the employees' "gratuity" would be based on 11 percent, and that the change would be effective January 19, 1995. Mueller Deposition Ex. 8. Contrary to the representation to the employees, Respondent continued to deduct 20 percent of the 11 percent from the gratuities being distributed to the banquet employees. Mueller Deposition at 59 and Mueller Deposition Ex. 12.

Questions were raised by the banquet staff regarding their compensation and on February 17, 1995, the general manager sent a memorandum to the banquet staff noting that questions had arisen, stating Respondent's desire to have "the most highly motivated employees in the city", and stating that it had been decided to return the gratuity portion back to 12 percent. That change was made effective February 17, 1995. Mueller Deposition Exs. 9 and 10. Again, Respondent actually continued to retain 20 percent of the 12 percent it claimed it was paying to the banquet employees.[2]

In February 1995, some of the banquet employees learned that Respondent was keeping 20 percent of the 12 percent they had been told had been being distributed among the employees. On March 17, 1995, a meeting was held where the general manager admitted that Respondent was keeping the 20 percent. The banquet employees also learned from the food and beverage manager that the additional 20 percent amounted to over $20,000 per year for the Respondent. The general manager informed the banquet employees that this practice was common among hotels and had been Respondent's practice since it opened the Radisson Plaza Hotel some six years earlier. As a result of these revelations, some banquet employees filed complaints with the Department on March 30, 1995. Those complaints particularly took issue with

Respondent keeping the 20 percent of the 11 or 12 percent they thought was supposed to be theirs. Affidavit of Delbert Cory Exs. A and B.

Delbert Cory, Senior Labor Investigator, investigated the matter for the Department. In a Notice to Respondent dated April 5, 1995, Cory requested certain payroll and other information regarding the banquet employees. He also requested customer billing statements showing the amount of gratuities charged for the entire period of April 5, 1993, through April 5, 1995. Cory Affidavit Ex. C. Respondent objected to that request and Cory notified it that if they admitted to retaining a percentage of the 11-12 percent gratuity charge, they would not have to submit the documents. By letter of May 24, 1995, from its counsel, Respondent admitted that it "retained 20 percent of the 11-12% charge it collected." Cory Affidavit Ex. F.

Cory audited the payroll records supplied by Respondent. He extracted information for each of the employees which he placed on separate sheets. Affidavit of Roslyn Wade, Ex. B. For each of the employees that was paid less than $4.25 per hour, he computed the total back minimum wage. For each employee, he also computed what he labeled as "diverted tips due". He computed that amount by taking the amount shown as "GRAT" on the payroll register for each employee for each payroll period and multiplying it by 25 percent.

On August 15, 1995, Cory issued a Notice of Labor Law Violation to Respondent. Cory Affidavit Ex. D. Regarding the gratuities violation, the notice described the violation as follows:

> Failed to distribute all of obligatory gratuity charged to employees. Employer retained 20%.

The notice informed Respondent that it could voluntarily comply with the notice by paying its employees the amount specified on enclosed documents within 10 days. Respondent did not do so and on October 3, 1995, the Department issued a labor law violation and Order to Comply to Respondent. Again, regarding the gratuities violation, the description of the violation was stated as it had been on the Notice of Labor Law Violation. Cory Affidavit Ex. E.

Procedural Background

In the Previous Order, it was determined that the 16 percent service charges charged by Respondent to banquet customers during the period from April 5, 1993, to April 5, 1995, fell within the definition of gratuities set forth in Minn. Stat. § 177. 23, subd. 9, because the notice required by that statute was not given. Because the service charges were gratuities, it follows that Respondent's practice of retaining a portion of the service charge rather than paying them over to the direct service employees violated Minn. Stat. § 177.24, subd. 3, and Minn. R. 5200.0080, which make gratuities the property of the employees and prohibit forced sharing of gratuities. Likewise, because they were gratuities, Respondent could not count the portion of them that it paid to employees toward meeting the minimum wage and therefore was in violation of Minn.

Stat. § 177.24, subd. 1, which required payment of a minimum wage by large employers of $4.25 an hour.

In the Previous Order it was noted that it was still to be determined whether the Department's calculations of amounts due were correct, whether a violation of Minn. Stat. § 177.30, subd. 3, regarding record keeping, existed, and whether any settlements between Respondent and individual banquet employees could and should be reviewed. In a telephone conference of August 26, 1996, Respondent stated that it did not dispute the allegation that it did not maintain employee time records by week and did not dispute the $200 fine for the violation. Further discovery was allowed regarding the back-pay calculations. In a telephone conference of October 16, 1996, it was determined that Respondent would supplement and clarify certain answers to interrogatories, that discovery would be completed by October 30, 1996, that Respondent would note any objections to the Department's back-pay calculations by October 30, 1996, and that the parties would file briefs on the two issues remaining, namely, (1) whether all employees who had tips diverted and were not paid the minimum wage were entitled to back wages and tips or whether only "direct service employees" were so entitled, and (2) whether Respondent's settlements with certain of its employees may be examined to determine whether additional back pay and diverted tips were due.

In a letter from counsel dated November 4, 1996, Respondent stated it had no objections to the Department's back-pay calculations. Gretz Affidavit, Ex. F.

Direct Service Employees

Minn. Stat. § 177.24, subd. 3, provides, in relevant part:

> For purposes of this chapter, any gratuity received by an employee or deposited in or about a place of business for personal services rendered by an employee is the sole property of the employee. No employer may require an employee to contribute or share a gratuity received by the employee with the employer or other employees or to contribute any or all of the gratuity to a fund or pool operated for the benefit of the employer or employees. This section does not prevent an employee from voluntarily and individually sharing gratuities with other employees. The agreement to share gratuities must be made by the employees free of any employer participation.

Minn. Stat. § 177.23, subd. 9, defines gratuities as follows:

> "Gratuities" means monetary contributions received directly or indirectly by an employee from a guest, patron, or customer for services rendered and includes an obligatory charge assessed to customers, guests or patrons which might reasonably be construed by the guest, customer or patron as being a payment for personal services rendered by an employee and for which no clear and conspicuous notice is given by the employer to

the customer, guest or patron that the charge is not the property of the employee.

Respondent argues that only "direct service employees" are eligible for back wages for minimum wage violations or diverted gratuities. This argument is based in part upon certain provisions of Minn. R. 5200.0080. That rule contains provisions interpreting and implementing the provisions of Minn. Stat. § 177.24, subd. 3. It also contains some provisions on the tip credit that has now been phased out in Minnesota under Minn. Stat. § 177.28, subd. 4 (1994). The tip credit statute itself was entirely repealed in 1996. Laws of Minn. 1996, Ch. 305, § 52.

Minn. R. 5200.0080, subp. 6, states:

> A "direct service employee" is one who in a given situation performs direct service for a customer and is to be considered a tipped employee. An indirect service employee is a person who assists a direct service employee, these include, but are not limited to, bus people, dishwashers, cooks, or hosts.

Under Minn. R. 5200.0080, subp. 4, an indirect service employee with whom a direct service employee voluntarily shares a gratuity may not have the payment considered in the calculation of his or her wages. Minn. R. 5200.0080 deals with the treatment of "gratuities presented to a direct service employee" on credit cards or charges. Under Minn. R. 5200.0080, subp. 8, where two or more direct service employees provide direct service to a group of customers, the gratuities from those customers may be divided among the direct service employees without violating the prohibition against sharing gratuities in Minn. Stat. § 177.24, subd. 3.

Respondent points out that in the original Notice of and Order for Hearing it was alleged that "Respondent kept one-fifth of gratuities due to direct service employees . . . ." Thus, Respondent argues, Complainant has "inasmuch demonstrated" its understanding of the rule to apply only to direct service employees. Respondent's Memorandum at 2. In the Amended Notice of and Order for Hearing, the allegations was amended to read "Respondent kept one-fifth of the gratuities due to these employees . . ."

Complainant points out that Minn. Stat. § 177.24, subd. 3, does not distinguish between direct service and indirect service employees and only states that any gratuity for personal services rendered by an employee is the sole property of the employee. Complainant argues that because the statute does not expressly limit the "personal services rendered" to direct personal services, then both direct and indirect service employees are entitled to restitution of diverted tips. Complainant's Second Supplemental Memorandum at 4. The Complainant argues that the distinction between direct service employees and indirect service employees must be read in the context of the other provisions of Minn. R. 5200.0080. Those provisions are paraphrased above and appear to the Administrative Law Judge to clarify the meaning of "gratuities" and

the application of the prohibition on sharing gratuities under Minn. Stat. § 177.24, subd. 3. A gratuity is defined under Minn. Stat. § 177.23, subd. 9, as a monetary contribution to an employee for services rendered. Somewhat redundantly, Minn. Stat. § 177.24, subd. 3, states that a gratuity received for personal services rendered by the employee is the property of the employee. It is difficult to imagine how any personal service rendered could be rendered anything but directly.

In its Reply Brief, Complainant supplements its argument on this point by arguing that the fact that Minn. R. 5200.0080, subp. 6, states that direct service employees are to be considered "tipped employees" is significant because it indicates that the purpose of defining direct service employees was to define those employees for which a tip credit could be taken by the employer. Thus, it argues, with the abandonment of the tip credit the distinction is no longer meaningful. Complainant's Reply Brief at 1-2. An examination of the history of Minn. R. 5200.0080, subp. 6, shows just the opposite. Prior to 1987, subp. 6 provided as follows:

> **Service person**. A service person is one who in a given situation performs the main service for a customer and is to be considered the recipient of the gratuity for purposes of wage calculation.

Minn. R. 5200.0080, subp. 6 (1985). The prior provision expressly related to the tip credit. In amendments proposed November 3, 1986, at 11 State Register 770 and adopted March 23, 1987, at 11 State Register 1740-41, subp. 6 was modified to read as it does today. Other changes were made, including removing most of the references to the tip credit that was being phased out at the time and was to expire entirely as of January 1, 1988. Thus, the term "direct service employee" was a new term first used in 1987 in Minn. R. 5200.0080 and related to the other new provisions added at that time regarding sharing of gratuities. It had nothing to do with the tip credit provisions that were about to expire. It is also noted that the rule has not been modified since 1987, a further indication that the distinction between direct service employees and indirect service employees relates to sharing of gratuities, not tip credits.

The Department has previously used the "direct service employee" definition in determining whether banquet service charges were gratuities. In In the Matter of Alleged Labor Law Violations of Gangelhoff Investments, Inc., d/b/a Holiday Inn, Bemidji, OAH Docket No. 5-1900-7252-2. The Department sought a determination that the 33 percent banquet service charge collected by the employer in that case was gratuities and should have all been paid to the direct service employees under Minn. Stat. § 177.24, subd. 3. In that case, the employer had paid 60 percent of the surcharge over to the direct service employees and the remaining 40 percent over to the indirect service employees involved in the banquets. It kept none for itself. Judge Kaibel found that the service charges were not gratuities because everyone concerned, employer, employees, and customers, never presumed that a 33 percent surcharge was meant to be a tip for the direct service employees. To the contrary, he concluded that common sense indicated that 33 percent was so far in excess of a common tip that there was no requirement in that case for the clear and conspicuous notice required by

the statute that the service charge was not a gratuity. As he noted, the ruling was limited to the unusual facts of that case.

Respondent has provided a copy of a letter written by the Department to an attorney for an employer on March 18, 1992. Affidavit of John P. Haberman No. 4, Ex. A. In that letter, the Department apparently agreed with the employer that five of the employees did not perform all of their work in "direct" food or liquor service and therefore agreed to reduced back-pay computations for those individuals.

Despite the fact that the Department has apparently reached an agreement once with an employer regarding work that employees did as indirect service employees, it must, nonetheless, be concluded that the prohibition on tip sharing in Minn. Stat. § 177.24, subd. 3, applies to any gratuity received by any employee for personal services rendered, not just those received by direct service employees. The language of the statute is clear. The use of the term “direct service employee” in Minn. R. 5200.0080, relates primarily to how tips may be shared among employees without violating the statute. It is not the purpose of the rule or the term to further define the meaning of “gratuities”.

Even if it were determined that only direct service employees were protected by the prohibition against sharing of gratuities in Minn. Stat. § 177.24, subd. 3, the entire amount of the service charges in question here would still have to be paid over to Respondent's employees. There are two reasons for this. First, it was determined in the Prior Order that Respondent's 16 percent service charges were gratuities in their entirety. As such, they are the sole property of the employees and must be paid over to them.

The second reason that Respondent must pay over all the service charges collected during the period in question to the employees is that all the employees involved in this matter were working as direct service employees when a portion of their gratuities were illegally retained by Respondent. Respondent only paid what it now calls commissions to employees while they were working as banquet servers, banquet managers, or bartenders. All of those positions provided “direct service” to the banquet customers. In effect, Respondent has already designated the direct service employees by paying them a “GRAT” according to its own payroll registers. There are some employees shown on the Department’s documents (Gretz Affidavit, Ex. C) that are listed as “banquet setup”. But, in fact, the amounts paid to them as “GRAT” were for work performed in the direct service positions, and those amounts were used by Cory in his back pay calculations.

Effect of Settlements with Employees

Under Minn. Stat. § 177.27, subd. 6 (1994), employers are liable for back wages and gratuities as determined in the hearing process, the Commissioner can establish escrow accounts, and hearing costs of up to ten percent of back pay and gratuities awarded can be assessed if the Administrative Law Judge finds the employer had no meritorious defense against the claim. Under Minn. Stat. § 177.33 (1994), employees

could bring court actions for minimum wage and overtime violations and collect compensation therefor, plus an additional equal amount as liquidated damages. The statute also provided:

> An agreement between the employee and the employer to work for less than the applicable minimum wage rate is not a defense to the action.

Several changes were made to these statutes in 1996. Laws of Minn. 1996, Ch. 386, §§ 3-4. A new Minn. Stat. § 177.27, subd. 7, was added that gave the Commissioner the authority to order an additional equal amount of back pay and gratuities as liquidated damages, impose civil penalties for repeated and willful violations, and assess an unlimited percentage of the costs, and assessed interest on unpaid balances from the date of the Commissioner's order. The former provisions of Minn. Stat. § 177.33 were moved into Minn. Stat. § 177.27, subds. 8-10.

On December 28, 1995, Cory sent letters to the affected employees with his calculations of the amounts owed them by Respondent and informing them of their right to pursue a court action for twice the amount computed. Haberman Affidavit No. 3, Ex. E. (The Department did not have the power to assess double damages at the time the wages in this matter were paid.) On January 12, 1996, Cory again wrote the employees more specifically detailing Minn. Stat. § 177.33, telling the employees that the Department could not seek the liquidated damages so they might wish to pursue that claim on their own, and asking them to respond as to whether they wanted to be excluded from the group on whose behalf the Department was taking action. Haberman Affidavit No. 3, Ex. F. Four employees returned forms to the Department asking to be excluded. Gretz Affidavit, Ex. E. Subsequently another 14 employees reached settlements with Respondent and signed forms so stating and requesting that the Department cease pursuing the claim on their behalf. The forms were submitted to the Department by Respondent on June 3, 1996. Gretz Affidavit, Ex. D.

Complainant argues that the settlements should be scrutinized in this proceeding to ensure that no employee agreed to receive wages in violation of the Minnesota Fair Labor Standards Act (Minn. Stat. §§ 177.21 - 177.35). Complainant points out the federal courts have held agreements to waive statutory wages as contrary to public policy and, therefore, null and void. See, for example, Brooklyn Savings Bank v O'Neil, 324 U.S. 697, 65 S.Ct. 895 (1945). Respondent argues that the settlements are not waivers of the minimum wage, but compromises of questionable claims.

Nothing in Minn. Stat. § 177.27 limits the power of the Department to investigate wage matters in this state, issue compliance orders and determine employer liability for back wages and gratuities. No approval of employees is required and no settlement by employees halts the process. Unfortunately, Cory's letter to the employees gave that impression. He was wrong, but his action is not binding on the Department. Respondent was not prejudiced by it and can not take advantage of it now. Moreover, what was once Minn. Stat. § 177.33 (1994), and is now found Minn. Stat. § 177.27, subd. 8 (1996), making agreements to work for less that the minimum wage

unenforceable, indicates the clear public policy in this state that such agreements are null and void. Thus, it is concluded that Respondent must repay the amounts determined here for back pay for minimum wages and retained gratuities. However, credit should be given to Respondent for additional amounts it paid to the employees under the settlements.

Calculation of Back Wages and Gratuities

The Administrative Law Judge has examined the back wage and gratuity calculations made by Cory shown in Wade Affidavit, Ex. B. They appear to be accurate calculations made from Respondent's payroll registers for the audit period. Wade Affidavit, Ex. A. The minimum wage back pay calculations appear to have been done appropriately, although Cory ignored one case where subminimum wages one day and higher wages on another day during the pay period averaged out to above minimum wages. Thus, the back wage calculations summarized on Gretz Affidavit, Ex. A. are correct.

However, while Cory's diverted gratuities calculations were mechanically correct, he calculated the wrong item. Cory used the "GRATs" paid to the employees during the audit period and multiplied them by 25 percent. This calculation gave him the amount that Respondent had secretly retained from the 11 or 12 percentage points they were told they were getting. It restored the 20 percent to the employees. But, it did not restore the additional five or four percentage points the employees were told Respondent was keeping. In order to restore the entire 16 percent service charge to the employees, it is necessary to adjust Cory's figures. And, again, it is appropriate to do so because the entire service charge was legally a gratuity and belonged to the employees.

If we use the great majority of the audit period during which Respondent represented that it was keeping four percentage points and paying the employees 12 percentage points, the calculations are as follows:

Service Charge 16% of banquet charge

Split of Service Charge:

	Reported	**Actual**
Respondent	4 pts (25%)	6.4 pts (40%)
Employees	12 pts (75%)	9.6 pts (60%)
25% Cory adjustment		2.4 pts
Employees' share plus 25%		12.0 pts (75%)

In order to raise the employees to the full 16 points to which they were entitled, they should receive an additional 6.4 points (what Respondent was keeping), instead of the 2.4 points under the "Cory adjustment". In order to determine that amount, the "Cory adjustment" must be multiplied by 2.67, which is 6.4 divided by 2.4. Similar calculations for the approximate month that Respondent told employees it was paying them 11

points results in a multiplier of 3.27. It is appropriate to simply use the 2.67 multiplier for that month as well in order to avoid re-examining all the payroll registers for that period. The negative effect on the individual employees for that month is very small.

Other matters

The Administrative Law Judges finds that Respondent's defenses against the claims in this matter were not meritorious. The statutes involved are very clear and the only confusion that existed arose because of what can most kindly be called Respondent's creative legal arguments. But it has been the law in Minnesota since 1977 that obligatory charges assessed to customers for personal services are gratuities unless there is a clear and conspicuous notice that the charge is not the property of the employee and also the law since 1977 that gratuities are the sole property of the employees. Laws of Minn. 1976, Ch. 369, §§ 1 and 2. All that Respondent had to do was provide the clear and conspicuous notice. Instead, it created the illusion of lower prices by allowing it to appear that the service charge was a tip. Thus, the Administrative Law Judges recommends an assessment of costs up to ten percent as permitted by the 1994 statute.

Respondent deceived its employees by secretly keeping 20 percent of what it claimed it was paying them. It is interesting to note that by doing so it was also avoiding sales tax on that 20 percent. Respondent's lack of veracity leads the Administrative Law Judge to recommend that the Commissioner require payment to the Commissioner for distribution to the employees, rather than allowing Respondent to make payment directly to the employees. It will be easier for the Department to verify. On the other hand, it would enable Respondent to avoid payment of the employer's share of Social Security and Medicare, so the Commissioner may wish to weigh that factor.

Finally, the Administrative Law Judge recommends that the Commissioner apply the interest provisions of the new statute. Since it will apply only from the date of the Commissioner's Order, it's application will not be retroactive.

S.M.M.

---

[1] In the Memorandum to the Previous Order, there were several erroneous references to Minn. R. 5200.0800. All those references should have been to Minn. R. 5200.0080.

[2] In the Previous Order, it was incorrectly determined that the employee percentage had been 11 percent throughout the audit period and then raised to 12 percent in February 1995. Closer examination of the deposition and documents shows that it was 12 percent throughout the audit period except for the brief period from January 19 to February 17, 1995.